

IN THE COURT OF APPEAL OF BELIZE AD 2018

CRIMINAL APPEAL NO 1 OF 2015

ROSALILIA CASTILLO

Appellant

v

THE QUEEN

Respondent

BEFORE

The Hon Mr Justice Sir Manuel Sosa

President

The Hon Mr Justice Samuel Awich

Justice of Appeal

The Hon Madam Justice Minnet Hafiz-Bertram

Justice of Appeal

A Sylvester for the appellant.

C Vidal, Director of Public Prosecutions along with J Tillett for the respondent.

4 April 2016 and 2 November 2018.

HAFIZ-BERTRAM JA

Introduction

[1] On 12 June 2014, Rosalilia Castillo ('the appellant') was indicted for murder contrary to section 117 read along with section 106(1) of the Criminal Code, Chapter 101 of the Laws of Belize. The particulars of the crime being that on 8 December 2012, at Santa Elena Town, in the Cayo District, she murdered Carla Perez (Carla). She stood trial from 25 November 2014 to 14 January 2015, before Moore J, in a judge alone trial. On 22 December 2014, the court entered a verdict of not guilty in relation to the charge of murder but guilty of manslaughter. On 14 January 2015, the appellant was sentenced to a term of imprisonment of 12 years after a mitigation hearing.

[2] On 12 January 2015, the appellant appealed her conviction and sentence. The appeal was heard on 4 April 2016. On that same day, the Court dismissed the appeal

and confirmed the conviction and sentence. We promised to give our reasons in writing. We do so now. The delay in doing so is regretted.

The pertinent evidence for the Prosecution

[3] The Prosecution called 13 witnesses to prove its case. Luz Minerva Perez, the sister-in-law of the deceased was called to prove that Carla Perez is dead. She went to the Karl Heusner Memorial Hospital (KMH) morgue and identified the body of Carla to the doctor and the police officer. The doctor being, Dr. Mario Estrada Bran who gave evidence that Carla is dead and also what caused her death. In his opinion, the cause of death was exsanguination due to internal and external bleeding caused by a 15 millimetre injury which had irregular borders, situated on the neck, at 1 centimetre to the left side of the anterior mid line of the body and the injury caused a wound to the sub clavicle vein. This evidence satisfied the trial judge that the deceased died of harm.

[4] The evidence that the appellant caused the death of the deceased was circumstantial. The prosecution called two witnesses to prove that it was the appellant who inflicted the fatal wound on the deceased. These witnesses were Rodolfo Melgara Renderos (Renderos) and Marvin Enriquez Tut Cucul (Cukul). It was the evidence of these two witnesses that the appellant and the deceased had a physical altercation in the bar owned by the appellant and it was the appellant who initiated the argument.

[5] Renderos testified that he had been with the appellant and Carla, the deceased, earlier in the day, drinking and accompanying them while they did errands. Later they were at the bar owned by the appellant and drinking together. Sometime thereafter, the appellant left the premises and called for Carla to join her at the Kia, a vehicle which was parked outside of the premises. Carla did not move although she was called three times. The appellant then came back inside the bar and according to the testimony of Renderos, she touched Carla on the head. He testified that he saw the movement of the hands of the appellant. Further, that the appellant and Carla were facing each other and he saw the right hand of the appellant touch Carla's head. She used her other hand to hit Carla in the stomach. He said that Carla dropped on the ground face down when she was touched on the stomach and he saw a red liquid, like blood, which came out of her body.

[6] Cucul, the other main witness for the prosecution, testified that he was a bartender at Palomas Del Norte, the bar owned by the appellant. He had known the appellant for about 10 to 12 years when the incident occurred. He testified that on the night of the incident he was behind the bar and about 10 to 15 feet away from the altercation. He said that about 9.30 pm whilst the appellant and Carla were drinking at a table at the bar, a young man approached the table and “they started arguing”. The appellant then got up and went to the bar counter. The young man followed and the argument continued. Carla then grabbed the hand of the young man and pulled him aside. The evidence of Cucul was that the appellant left the bar and went to her vehicle which was parked outside and she started it. Thereafter, the appellant went back inside of the bar and according to him hit Carla in her upper chest area with her hands. Cucul further testified that he saw Carla fall on her face and started bleeding. At this time, the appellant tried to lift up Carla but could not do so and asked for help. All the clients left at that instant. In cross-examination, Cucul insisted that no bottle was broken during the incident between the appellant and Carla. According to his evidence, it was a patron who broke a beer bottle on his way out of the bar after the incident occurred.

The unsworn statement of the appellant

[7] The appellant gave an unsworn statement. She referred to Carla as ‘Pam’. In relation to the incident she said the following:

“... At the night of the incident Pam and I entered the bar. We started socializing but there was a guy that started to disrespect her, telling her insulting words. I told him if he doesn’t stop disrespecting her he has to leave. But he started to insult me also. I repeated to the guy you have to leave this place. Pam was trying to move him out. I stopped Pam saying leave this guy, you and me should leave, let’s go, let’s go. I walked outside expecting her to follow me but she was not behind me. I turn and say, I’ll make sure that what he told me, it won’t be left like that. I pulled her waist band but she pushed me away. She insisted that she would go back. When I leave Pam she was standing up expecting her to come with me but she didn’t. I looked back and I saw Pam

face down on the floor. I hurry in, I started shaking her but she didn't respond. I started asking her what happened. I tried to lift her up, calling for help and help and help. Lenny came and gave me a hand. I put her into the Kia and went as fast as I can. I was shocked. I just was telling her hold on, we soon reach the hospital, we soon reach; hold on, hold on.

When I arrived at the hospital there was a guy outside. I said help me take her out. He went in and I started to take her out. He came with a stretcher and I already had her out. There was a nurse and she started asking me questions and I just said, tend to her. I started helping take off her clothes because I didn't know where she was hurt. She said something about police, worrying about police. I wanted a doctor. Gradually she said, "she's dead." I couldn't take it. I get home. I get in my vehicle.

The night of the accident I didn't have nothing in my hands, no weapon, no knife, no nothing. I in no way I didn't stab Pam. I didn't even hit her. I did not hurt her in no way. I would have no reason to do such things to someone I really love.

By the Grace of God, I'm telling you the truth, Your Honour. Until this moment only God has me surviving without her. Thank you, Your Honour."

Grounds of appeal

[8] There were four grounds of appeal which were filed on 10 February 2016. Two of those grounds were abandoned. The appellant sought leave to add an additional new ground, which was granted. The three grounds of appeal argued at the hearing were:

- (1) The trial judge erred in failing to give herself a *Lucas* direction in respect of that portion of the appellant's unsworn statement she disbelieved;
- (2) The trial judge failed to direct herself on the defence of accident;
- (3) The trial judge failed to consider the alternative verdict of manslaughter by negligence in light of the evidence.

The ground on the *Lucas* direction

[9] Learned counsel, Mr. Sylvester submitted that the appellant denied inflicting any harm to Carla which caused her death, as alleged by Renderos and Cucul. After he quoted from the evidence of both Renderos and Cucul, counsel considered the treatment of same by the trial judge. He relied on the portion of the judgment at page 128 of the transcript where the trial judge said the following:

“Because the prosecution evidence has made me feel sure and left me without any doubt that the accused caused the neck injury on the deceased, I do not accept the crux of the unsworn statement – that the accused didn’t cause the injury and doesn’t know how it was caused. I necessarily give the statement of the accused little, if any weight. If, as the accused claims when she told the deceased to come with her outside, the deceased said she did not want to and was going to deal with the young man, why did or how could the accused think (as she said she did) when she turned to walk to the door that the deceased was following her. This does not make sense as I consider what the accused said in her statement.”

[10] Mr. Sylvester contended that the trial judge regarded the appellant’s unsworn statement as lies. Learned counsel relied on the learned authors of *Archbold, 2001 Ed.* at paragraph 4-402 where it is stated as follows:

“In *R v Godway*, 98 Cr. App. R. 11, C.A., it was held that whenever lies are relied on by the prosecution, or might be used by the jury, to support evidence of guilt as opposed to merely reflecting on the defendant’s credibility, a judge should give a full direction in accordance with *R v Lucas (R)* [1981] Q.B. 720, 73 Cr. App. R. 159, C.A. to the effect that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury are satisfied that: (a) the lie was deliberate, (b) it relates to a material issue, and (c) there is no innocent explanation for it. The jury should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behavior.”

[11] Mr. Sylvester submitted that the Crown's case was predicated on the basis that the appellant was lying in relation to the incident that led to the death of Carla and her version of the incident was fabricated.

[12] Counsel further submitted that the trial judge, as the judge of the facts, clearly considered that the appellant's version was a lie. As such, it was incumbent on the judge to give a full *Lucas* direction and since there was a failure of doing so, this constituted a miscarriage of justice.

[13] The Director in response submitted that there was no miscarriage of justice in relation to lies told by the appellant since she did not rely on the lies of the appellant. She drew to the attention of the Court that portion of the judgment at page 128, lines 10 to 17 where the judge said:

“At the forefront of my mind as I consider the statement is that the accused has nothing to prove to this Court and even if I do not accept her statement as true it does not mean that I must necessarily convict her. It is the prosecution evidence that must make me feel sure of the guilt of the accused.

Because the prosecution evidence has made me feel sure and left me without any doubt that the accused caused the neck injury on the deceased, I do not accept the crux of the unsworn statement – that the accused didn't cause the injury and doesn't know how it was caused...”

[14] In the opinion of the Court, it was absolutely clear from the judgment of the trial judge that she did not rely on the lies of the appellant to satisfy herself of the guilt of the accused. Learned counsel, Mr. Sylvester referred the Court to page 128, starting from paragraph 4. The Director referred the Court to the same page 128, but starting from paragraph 3. The true picture was gathered from the commencement of paragraph 3 where it is shown that the trial judge considered the unsworn statement of the appellant but reminded herself that (a) the appellant had nothing to prove; (b) even if she had accepted the unsworn statement as true that does not necessarily mean the court will convict the appellant; and (c) it was the prosecution evidence that must make her feel sure of the

appellant's guilt. It can be seen from the foregoing that the trial judge advised herself to rely on the evidence of the prosecution.

[15] At paragraph 4 of page 128, it is shown that the trial judge in fact relied on the evidence of the prosecution and not the unsworn statement of the appellant. She stated that, "*Because the prosecution evidence has made me feel sure and left me without any doubt that the accused caused the neck injury on the deceased ...*". There is nothing in the judgment to indicate that the judge relied on lies of the appellant to convict her. The fact that the judge said that she did not accept the crux of the unsworn statement, was no indication that she relied on lies of the appellant to convict her.

[16] In the opinion of the Court, there was no miscarriage of justice since the trial judge did not rely on lies of the appellant and therefore, was not required to give herself a *Lucas* direction. The ground was without merit.

The ground on failure of the trial judge to give direction on the defence of accident

[17] Mr. Sylvester submitted that the trial judge addressed the defence of accident but failed to direct herself on the law of accident. As a result, the appellant was deprived of a fair trial and a possible verdict of acquittal.

[18] Counsel contended that the trial judge did not properly consider all the relevant evidence. He referred to the fact that none of the witnesses who were nearby when the incident occurred, saw the appellant with a weapon in her hand. Further, no instrument such as a knife was found at the scene when it was processed by the Scenes of Crime personnel. Mr. Sylvester submitted that this should have left some doubt as to whether the injuries were inflicted as suggested by the witnesses or inflicted accidentally as contended by the defence. Counsel referred to that part of the judgment where the trial judge had to concede that it was curious that none of the witnesses saw the appellant with a weapon in her hand.

[19] Mr. Sylvester submitted that the witnesses description as to the part of the body that was struck was inconsistent with the exact location of the fatal injury. He contended that

this was material but the trial judge resolved the inconsistency in favour of the prosecution. (page 132 line 11 of the transcript).

[20] Counsel relied on the case of **Lolita Lynch v The Queen**, Criminal Appeal No. 22 of 1995, of this Court, which stated that when dealing with specific issues of accident and doubt may exist, any doubt which is entertained should be resolved in favour of the appellant. He contended that the trial judge would have entertained doubts in relation to the two witnesses and since it was resolved in favour of the prosecution she made an error. He further submitted that this error was compounded by the failure of the judge to direct herself on the defence of accident. As such, a material irregularity occurred at the trial below.

[21] The Director in response submitted that there had to be an evidential basis for the defence of accident, before it could have been considered by the trial judge. Further, on the evidence, the defence of accident had not arisen on the case for the appellant nor the case for the prosecution. The Director submitted that the case for the Crown was that the appellant was the aggressor and she instigated the fight. Further, the evidence proved that Carla was trying to defend herself and there were distinct hits to her body.

[22] The Director referred the Court to the evidence of: (1) Renderos, at page 15 of the record, lines 15 - 20; (2) the evidence of Cucul at page 26; and (3) the unsworn statement of the appellant at page 84, line 16 onward to page 85, line 15. She contended that it can be seen from the evidence that the defence of accident did not arise and therefore the judge could not have considered such defence.

[23] This Court had no difficulty accepting the submissions of the Director. The evidence clearly refuted an accident. The appellant in her dock statement said that she repeated to the male person to leave the place. Further, Pamela (Carla) was trying to move him out and she stopped Pamela. (Page 84 line 16 of transcript). At page 85 line 15 of the record, the appellant stated that, "*The night of the accident I didn't have nothing in my hands, no weapon, no knife, no nothing. I in no way I didn't stab Pam. I didn't even hit her. I did not hurt her in no way. I would have no reason to do such things to someone I*

really love.” The appellant did not raise accident as a defence. In fact, she denied that she hurt the deceased in any way.

[24] As for the evidence of the prosecution, it showed that the appellant touched and hit the deceased. Renderos testified that:

“She (appellant) was calling her (Carla) after calling her three times. When she called her and she was walking towards her I saw she touched her on the head. Lily touched Pamela on the head. Then I saw **movements with her hands** and two bodies facing each other. Lily’s right hand touching Pamela’s head with her left hand. During that hand movements, Pamela dropped on the ground. During the movement to the stomach was when Pamela dropped. In the same moment when she (Lilly) touched her (Pamela) in the movement on her stomach, then Pamela fell.” (page 15 – lines 15 – 20).

[25] In cross-examination of Mr. Renderos, he said it is true that he saw the appellant put her left hand on the head of Carla and with her right hand she hit Carla in her stomach.

[26] The evidence of Cucul, at page 26 of the record showed the following:

“...Then Lily came inside again and went on top of Pamela and they started **fighting, hitting with her hands**. Lilly was hitting Pamela. Pamela was trying to defend herself with her hands also. Then I saw when she fell down on her face. Pamela fell down, She started bleeding. Then Lilly tried to lift her up. She (Lilly) asked for help to lift her up because she couldn’t...”

[27] In the opinion of the Court, the defence of accident had not been raised on the evidence.

Inconsistencies

[28] Mr. Sylvester further submitted that the inconsistencies in relation to the evidence of the part of the body of the deceased (Carla) that was struck was resolved in favour of the prosecution. He contended that in doing so the judge erred and therefore, the failure of the judge to direct herself on accident was compounded with this error. In the view of

the Court, counsel did not consider relevant portions of the judgment in making his argument. The Court was of the opinion that the trial judge drew an inference which was reasonable based on the evidence that was before her. At page 132 to page 133, starting from line 11, it is shown how the judge arrived at the conclusion that the appellant was responsible for the wounds which caused the death of the deceased. The judge said:

“A final and also significant point raised by the defence is that Renderos says he saw the accused touch the head of the deceased and strike her in the stomach, while Tut Cucul says he saw the accused strike the deceased in her upper chest. **Neither of these descriptions are consistent with the exact location of the fatal injury.** (The point where Mr. Sylvester stops) Here I considered, based on Tut Cucul’s testimony, that there were several blows in quick succession by the accused making contact with the body of the deceased. Renderos says he only saw one strike and that was to the stomach but I do not accept this portion of his evidence. I also considered that Renderos said in the “hand movements” he saw the accused touch the head of Carla Perez. **The head (according to Renderos) and the upper chest (according to Tut Cucul) are in the vicinity of the neck. I considered here that there is no evidence that ... anyone else approaching or touching the deceased and according to both witnesses, she fell bleeding to the floor immediately after the attack from the accused. Consequently, I feel sure in my conclusion that the accused caused the death of Carla Perez.**”

[29] Indeed, the trial judge acknowledged that the witnesses did not give evidence as to the exact location of the injuries received by Carla. But, she considered other evidence from these witnesses to arrive at her conclusion, namely: (a) Cucul’s evidence was that Carla received several blows in quick succession which made contact with her body; (b) Renderos evidence which the judge did not accept that the appellant made one strike to Carla’s stomach; (c) Renderos evidence that the appellant touched Carla’s head; (d) The judge considered that the head and upper chest are in the vicinity of the neck; (e) No

other evidence that anyone else approached the deceased; (f) Evidence from both witnesses that Carla fell to the floor bleeding immediately after the attack.

[30] In the opinion of the Court, the trial judge properly considered the evidence before her and drew reasonable inferences in relation to the location of the injury and the person who caused the injury. The trial judge cannot be faulted for feeling sure in her conclusion that the appellant caused the death of the deceased, Carla Perez.

[31] For those reasons, the Court was of the view, that no irregularity occurred at the trial of the appellant.

The alternative verdict of manslaughter by negligence

[32] Learned counsel, Mr. Sylvester submitted that there are three possible offences for which the appellant could have been convicted, namely, murder, manslaughter or manslaughter by negligence. However, the trial judge considered only murder and manslaughter in the alternative. Counsel contended that based on the evidence of the prosecution and the defence, an alternative verdict of manslaughter by negligence was open but, was not considered by the judge and as a result there was a miscarriage of justice. He submitted that as a result of this failure, the appellant was denied a fair trial in which the lesser verdict of manslaughter by negligence could have been entered. Counsel relied on the case of **Broadhurst v The Queen** [1963] UKPC 28, in which the Board stated that the appellant in that case could have been convicted of three possible verdicts.

[33] The Director submitted that manslaughter by negligence did not arise in this case as the appellant was indicted for the offence of murder and for the judge to have convicted on any other offence which was not on the indictment, that had to have been a statutory alternative. She relied on **section 126** of the **Indictable Procedure Act, Chapter 96** which sets out the various alternatives that are available on an indictment and **section 97** of the **Criminal Code, Chapter 101**.

[34] In reply, Mr. Sylvester submitted that **section 116** of the **Criminal Code** incorporates manslaughter by negligence. Further, when **section 126(2)** of the **Indictable Procedure Act** is read with **section 116** of the **Criminal Code** which defines manslaughter, it would appear that manslaughter by negligence is available since that is also defined. On this basis, counsel submitted the trial judge could have considered the alternative verdict of manslaughter by negligence.

The statutory provisions on alternative verdicts

[35] Section 126 of the Indictable Procedure Act provides:

“126.-(1) Upon an indictment charging an accused person with murder, if prosecution fails to prove that the accused person intentionally caused the death of the deceased, but the jury is satisfied that the accused person **caused the death of the deceased by unlawful harm**, it shall find the accused person not guilty of murder but guilty of manslaughter.

(2) Subject to section 127 (2), **it shall not be lawful** for the jury in such circumstances **to find the accused person guilty of any crime other than manslaughter on that indictment.**”

[36] **Section 97 of the Criminal Code** provides for the definition of unlawful harm. It states: “*Harm is unlawful which is intentionally or negligently caused without any of the justifications mentioned in Title VI.*”

[37] **Section 116 of the Criminal Code** gives the definition for manslaughter. It provides:

“116(1) Every person who causes the death of another person by any unlawful harm is guilty of manslaughter.

(2) If the harm was negligently caused, he is guilty only of manslaughter by negligence.”

[38] The trial judge felt sure on the evidence that the appellant caused the death of Carla Perez. However, she was unsure *“if at the time the accused inflicted the injury she did so with the intention to kill the deceased. Consequently, I must acquit the accused of the offence of murder.”* The judge properly acquitted the appellant before considering the alternative offence of manslaughter.

[39] The appellant was indicted for murder and pursuant to section 126(1) and (2) of the Indictable Procedure Act, it was open for the trial judge to find the appellant guilty of manslaughter. That is, if the prosecution failed to prove that she intentionally caused the death of Carla, but the judge is satisfied that she caused the death by unlawful harm. The judge found that *“the accused caused the death of Carla Perez without intention to do so but also without any lawful justification for killing her. The accused is therefore guilty of the crime of manslaughter.”*

[40] Manslaughter as shown by the definition at section 116 (1) and (2), incorporates two different categories: (a) death caused by unlawful harm is manslaughter (b) if the harm is negligently caused then the person is guilty only of manslaughter by negligence. Harm is unlawful which is intentionally or negligently caused. In our opinion, it was proven by the evidence that the appellant caused the death of Carla by unlawful harm. There was no evidence that suggested that the appellant negligently caused the death of Carla Perez. As such, the trial judge was correct in not considering manslaughter by negligence. The case of **Broadhurst** relied upon by Mr. Sylvester is distinguishable on the facts. In **Broadhurst**, there were no marks of violence on the body of the appellant’s wife which was not caused by the fall on the steps itself. The nature of the injuries on the deceased threw no light on the cause of the fall. In the instant matter, there was evidence of a quarrel and fighting between the appellant and Carla. The question of manslaughter by negligence had not arisen in the instant matter. This ground was also without any merit.

Conclusion

[41] It was for those reasons that the Court dismissed the appeal and affirmed the conviction and sentence of the appellant.

SIR MANUEL SOSA P

AWICH JA

HAFIZ-BERTRAM JA